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Pre-trial Detainees Must Be Held Under the Least Restrictive Means Possible to Assure the Detainees' Presence at Trial. Rhem v. Malcolm, 371 F. Supp. 594, opinion supplemented, 377 F. Supp. 995 (S.D.N.Y.), aff'd, 507 F.2d 333 (2d Cir. 1974).

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CONSTITUTIONAL LAW—Due Process and Equal Protection—Pre-trial Detainees Must Be Held Under the Least Restrictive Means Possible to Assure the Detainees' Presence at Trial. *Rhem v. Malcolm*, 371 F. Supp. 594, *opinion supplemented*, 377 F. Supp. 995 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974).

Plaintiffs,[1] detainees at the Manhattan House of Detention for Men (MHD), more commonly known as the "Tombs,"[2] brought suit for declaratory and injunctive relief[3] against the Commissioner of

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1. Plaintiffs named in this action, James Rhem, Robert Freely, Leo Robinson, and Eugene Nixon, are no longer being detained at the Tombs. Plaintiff Robinson was held nine months in the Tombs and then acquitted. Interview with Steven A. Herman, Attorney for the Legal Aid Society Prisoners' Rights Project, in New York City, Oct. 21, 1974.

2. The facility, a 12-story jail located at 125 White Street in Manhattan, is the third in a line of city prisons in the area. The first, from which the nickname "Tombs" is derived, was built in 1838. The second, located across the street from the present building, was completed in 1902. The conditions there were intolerable almost from the beginning. When the present building was opened in 1941 it drew wide praise from assembled officials. Mayor Fiorello H. LaGuardia stated: "We should be able to streamline criminal justice as we have streamlined this building . . . . I'm certain that 48 years from now this building will be in existence and in good condition." N.Y. Times, Dec. 3, 1974, at 43, cols. 1-2.

3. Litigation, which dates back four years, was commenced as a class action pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1970), and 28 U.S.C. § 2201 (1970). The United States Supreme Court held, in Wilwording v. Swenson, 404 U.S. 249 (1971), that 42 U.S.C. § 1983 (1970), and 28 U.S.C. § 1343(3) (1970), give United States district courts jurisdiction to hear a state prisoner's application for injunctive relief against allegedly unconstitutional conditions of confinement. 404 U.S. at 251-52. In order to sue under section 1983, a plaintiff must show deprivation under color of law of a right or privilege secured by laws of the United States or the Constitution. Since no federal law guarantees rights to state prisoners, no relief can be rendered unless constitutional issues are involved. *Project—Judicial Intervention in Corrections: The California Experience—An Empirical Study*, 20 U.C.L.A.L. REV. 452, 529 n.311 (1973). This would apply to detainees in local detention centers as well. *See* Collins v. Schoonfield, 344 F. Supp. 257, 264 (D. Md. 1972). For a discussion of the various remedies available to prisoners, see Singer, *Enforcing the Constitutional Rights of Prisoners*, 17 How. L.J. 823, 825 (1973).

Corrections of the City of New York, the warden, the mayor, and various state officials.[4] Plaintiffs alleged that the conditions of their detention constituted a denial of their rights under the first, fifth, sixth, eighth, and fourteenth amendments.[5] The United States District Court for the Southern District of New York found unconstitutional conditions did exist[6] and ordered the city to submit a plan within thirty days to remedy the constitutional infirmities.[7] Six

4. Rhem v. Malcolm, 371 F. Supp. 594, *opinion supplemented*, 377 F. Supp. 995 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974). Those named in the suit included Peter Preiser, Commissioner of Corrections of the State of New York, Governor Malcolm Wilson, and Owen McGivern, Presiding Justice of the New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities, none of whom were involved in the appeal before the United States Court of Appeals for the Second Circuit. 507 F.2d at 335 n.3.

5. 371 F. Supp. at 597. The conditions complained of included "excessive imposition of maximum security conditions, limitations on visiting rights, the right to exercise and recreation; the lack of a 'tolerable living environment' caused by excessive heat and noise, insufficient ventilation and inability to see out of the building; the refusal to give an inmate the option to be locked in his cell rather than in a common area; inadequate disciplinary procedures; and interference with correspondence rights and the right to receive publications." 377 F. Supp. at 996. Certain others, including overcrowding, unsanitary conditions, and inadequate medical care, were settled according to a stipulation in a consent decree entered on August 2, 1973. 371 F. Supp. at 597. For a discussion of the conditions of pre-trial detention in New York City, as well as a discussion of the Tombs Riots of 1970, see Note, *Pre-trial Detention in the New York City Jails*, 7 COLUM. J.L. & SOC. PROBLEMS 350 (1971).

6. 371 F. Supp. at 636.

7. 377 F. Supp. at 997. The original opinion of January 7, 1974 instructed the parties "to prepare for a conference to determine the contents of an order consistent with this opinion." 371 F. Supp. at 637. At this conference, held on January 18, 1974, plaintiffs submitted a proposed judgment that the city present within 30 days a "comprehensive and detailed plan for elimination of the conditions which the court found to be unconstitutional, as well as for immediate entry of final judgment on the questions of correspondence, receipt of publications, disciplinary procedures, visiting schedules and 'optional lockout.'" 377 F. Supp. at 997. Over the city's protests, this proposed judgment became the substance of the court's decision, entered March 22, 1974, which made specific provisions concerning inmate correspondence, receipt of publications and disciplinary proce-

months later, the city had failed to produce either a plan or the money required to effectuate necessary changes.[8] The district court, in a supplementary opinion,[9] held that unless such a plan were submitted by the city within thirty days the Tombs would be closed.[10] The Court of Appeals for the Second Circuit affirmed[11] as to the finding of unconstitutionality, but stayed the order closing the Tombs[12] and remanded for further consideration of the remedy.[13]

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dures, set a date for a further evidentary hearing as to arrangements for contact visits, and as to other issues ordered the submission of the aforementioned plan within 30 days. *Id.*

8. 377 F. Supp. at 998-99. The March 22 judgment required that the plan be submitted by April 21, 1974. On April 22, over plaintiffs' objections, the city was granted an extension to April 29. On that date the city submitted a plan which the court adjudged deficient concerning contact visits, exercise and recreation, provision of adequate ventilation and light, and elimination of noise. The plan also revealed that the city was considering the possibility of closing the Tombs. On May 14 the court directed the city to submit within one week a statement of: 1) the city's position concerning the closing of the Tombs; and 2) when a final decision would be reached. The city replied that a final decision would be given on June 15. On May 29 the court ordered the city to submit specific plans for renovating the Tombs consistent with the court's opinion of March 22. In response, the city, on June 10, indicated that while funding had been approved for renovation of the fifth and eighth floors (as required in the consent decree), none had been approved for contact visit facilities, improving the heating and ventilation system, lessening the noise level or renovation of the basement and tenth floors, all of which were necessary to implement the March 22 opinion. On June 19 the city indicated that it had determined to continue operating the Tombs but that it would not submit the comprehensive and detailed plan required by the court. Again, on June 24 the city, in response to a court order, indicated that it was unable to provide a timetable as to when work on areas such as heating and ventilation, noise reduction, and facilities for contact visits (all factors which the court deemed significant in its original opinion) would commence. *Id.* at 997-98.

9. 377 F. Supp. 995 (S.D.N.Y. 1974).

10. *Id.* at 1000.

11. 507 F.2d at 336.

12. *Id.* at 335. The district court denied a stay pending appeal, but did, however, stay its order until the city had an opportunity to apply to the circuit court for a stay pending appeal. Brief for Appellant at 5, Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974). The circuit court granted the stay pending appeal on condition that the city "honor requests to transfer to New York City House of Detention for Men at Rikers Island or other

Shortly after the decision, the city made the question of appropriate remedy moot by deciding to close the Tombs and shift its population to the city institution at Rikers Island.[14]

Until recently, courts followed a "hands off" policy with respect to prison reform.[15] Prison problems were regarded as essentially

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available facility, at the discretion of the Commissioner of the Department of Correction, of inmates of the Manhattan House of Detention for Men who have been heretofore or who hereafter will have been detained 40 days or who hereafter are detained for 14 days." *Id.* at 5. Those not afforded this option included those currently on trial, held for mental observation, or determined to be escape risks. *Id.*

13. 507 F.2d at 336.

14. N.Y. Times, Nov. 16, 1974, at 23, col. 4. Plans to close the 33 year-old facility on White and Centre Streets in downtown Manhattan by the end of 1974 were disclosed by New York City Commissioner of Corrections Benjamin J. Malcolm. Commissioner Malcolm stated that the Tombs was being closed for administrative reasons, but Stanley Buchsbaum, First Assistant Corporation Counsel, indicated that the decision was the direct result of the circuit court's ruling. Agenor Castro, spokesman for the Department of Corrections, listed three possible alternatives for the Tombs: 1) strip the building and close it down; 2) close it temporarily to make major renovations; or 3) end use of the Tombs as a detention facility but continue its laundry and restaurant for the benefit of other city institutions. At the time of the city's decision to close the Tombs, 492 inmates were confined there. Of this figure, 398 detainees were to be sent to the New York City House of Detention for Men on Rikers Island, which can hold more than 1300 persons. The rest, convicted inmates, were to be transferred to the correctional institution for men on Rikers Island. *Id.* The New York County Lawyers' Association's Special Committee on Penal and Correctional Reform, in a letter to Mayor Beame, criticized the city's decision to close the Tombs. The Committee urged him to keep the facility open for those on trial and those whose presence is required in court, even though increased costs to the city would result. Any other decision was characterized as "so objectionable" as to be "unthinkable." 172 N.Y.L.J. 1, col. 6, (Dec. 10, 1974).

15. For a discussion of the "hands off" doctrine, see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L.J. 506 (1963), where it was stated that the primary reason courts refused to review internal prison administration was the "assertion repeatedly made that judicial review of such administrative decisions will subvert the authority of prison officials, the discipline of the prisons, and the efforts of prison administrators to accomplish the objec-

administrative and, as such, beyond the scope of judicial scrunity. Separation of powers required judicial non-involvement.

In time, however, the "hands off" doctrine began to erode[16] as courts found ways of justifying their involvement, particularly where constitutional[17] or statutory rights[18] were concerned. While prison conditions or practices which made life unpleasant for prisoners did not warrant the intrusion of courts,[19] the denial of a constitu-

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tives of the system which is entrusted to their care and management." *Id.* at 509; *see* Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. PA. L. REV. 985 (1962); Note, *Judicial Intervention in Prison Administration,* 9 WM. & MARY L. REV. 178, 179-80 (1967). Courts often avoided intervention in prison administration on procedural grounds. *See* Note, *Prisoners' Rights Under Section 1983,* 57 GEO. L.J. 1270 (1969). One court stated: "The courts have no supervisory jurisdiction over the conduct of various [penal] institutions . . . ." Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951).

16. *See* Singer, *Enforcing the Constitutional Rights of Prisoners,* 17 How. L.J. 823 (1973); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform,* 57 VA. L. REV. 841 (1971). For a study of the effects of judicial involvement in the California adult prison system, see *Project—Judicial Intervention in Corrections: The California Experience—An Empirical Study,* 20 U.C.L.A.L. REV. 452 (1973).

17. *See, e.g.,* Johnson v. Avery, 393 U.S. 483 (1969); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157 (E.D. Wis. 1973); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam,* 390 U.S. 333 (1968); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).

18. *See, e.g.,* Wayne County Jail Inmates v. Wayne County Sheriff, 391 Mich. 359, 216 N.W.2d 910 (1974) (failure of county officers to keep jail in adequate repair pursuant to statute justified court intervention).

19. *See, e.g.,* Hanvey v. Pinto, 441 F.2d 1154 (3d Cir. 1971) (prisoner may be confined in one section of a prison rather than another); Courtney v. Bishop, 409 F.2d 1185 (8th Cir.), *cert. denied,* 396 U.S. 915 (1969) (imposition of solitary confinement following prisoner's misconduct was not arbitrary); Wiltsie v. California Dep't of Corrections, 406 F.2d 515 (9th Cir. 1968) (officials may have power to destroy a prisoner's personal painting); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965) (not unconstitutional to fail to return letters not allowed to be mailed out).

tional right did justify judicial intervention.[20]

Rhem v. Malcolm represents the furthest extension of this recent trend toward judicial activism in prison reform. While other courts have threatened to close institutions,[21] *Rhem* is only the second decision in which a court has actually ordered a prison closed.[22] The location of the Tombs in the center of a large metropolis also makes the case unusual.[23]

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20. *See* cases cited note 17 *supra*. In Cruz v. Beto, 405 U.S. 319 (1972), the Court commented per curiam: "Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners." *Id.* at 321. State courts also have jurisdiction to grant relief, Commonwealth *ex rel.* Bryant v. Hendrick, 444 Pa. 83, 91, 280 A.2d 110, 113-14 (1971), but they have done so infrequently.

21. *See, e.g.*, Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) (interim order), *final order entered*, 358 F. Supp. 338, *motion order entered*, 361 F. Supp. 1235 (E.D. Ark. 1973), where it was "ordered, adjudged, and decreed that the Pulaski County Jail facility and its operation must meet . . . [constitutional] requirements and standards . . . or defendants shall cease and terminate the operation of said facility." 358 F. Supp. at 347-48. The jail was subsequently brought up to constitutional standards. 361 F. Supp. 1235 (E.D. Ark. 1973). *See also* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971), where the court held that "[u]nless conditions at the Penitentiary farms are brought up to a level of constitutional tolerability, the farms can no longer be used for the confinement of convicts." 309 F. Supp. at 383. Shortly thereafter, money was appropriated for new buildings and needed improvements, and the court noted that substantial progress had been made. 442 F.2d at 309.

22. The other ruling was Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974), where it was held, *inter alia*, that a 125 year-old facility for housing both detainees and convicted prisoners had outlived its usefulness and violated the constitutional rights of the detainees confined there. Substantial relief was awarded, including an injunction against the housing of detainees in the facility after three years from the date of the opinion. 360 F. Supp. at 691.

23. 507 F.2d at 340. Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974), involved a jail located on Charles Street in downtown Boston. There was, however, no question of making substantial physical changes in the jail. Indeed, the court concluded "that constitutional requirements cannot be satisfied without construction of a new jail . . . ."

Rhem v. Malcolm concerned pre-trial detainees rather than convicted prisoners.[24] This was an important factor in the court's decision.[25] But for his lack of money, the detainee would be free on bail.[26] Thus, whether or not someone is subjected to the conditions in the Tombs generally depends upon his ability to raise bail.[27]

The court of appeals noted that the purposes of bail and detention are identical, *i.e.*, to assure the accused's presence at trial.[28] Deten-

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360 F. Supp. at 686-87. The City of Boston did not, however, plead fiscal inability to construct a new jail.

24. Despite the fact that plaintiff class included "all the inmates of the Tombs," Rhem v. McGrath, 326 F. Supp. 681, 682 (S.D.N.Y. 1971), the circuit court noted that the Tombs is used to house a relatively small number of convicted misdemeanants as well as pre-trial detainees, but stated that "[t]he constitutional theory applicable to convicted prisoners is sufficiently different from that discussed here to justify not regarding them as part of the plaintiff class for purposes of this appeal." 507 F.2d at 336 n.5. However, the equal protection argument, *see* text accompanying notes 46-47 *infra,* should apply to those convicted as well as those awaiting trial.

25. 507 F.2d at 336-38. The entire due process argument, which is the primary basis for the decision here, hinges upon the fact that plaintiffs have not, as yet, been convicted of anything. *See also* Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd,* 494 F.2d 1196 (1st Cir.), *cert. denied,* 419 U.S. 977 (1974); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal: 1972).

26. 507 F.2d at 336. This is true except in those cases where no bail is set, such as where an accused is charged with a capital offense.

27. *Id.* Unlike bail, which is set at varying amounts for different alleged offenses and for persons appearing to be greater risks, detention conditions at the Tombs are the same for all held there. Everyone in the Tombs, regardless of charge, is held under maximum security. 371 F. Supp. at 624. The Legal Aid Society has sued to upset the bail system, alleging that defendants in Manhattan who are unable to post bail and who are, therefore, detained, are convicted more frequently and receive harsher sentences than defendants who are released pending trial. N.Y. Times, Oct. 22, 1974, at 45, col. 1.

28. 507 F.2d at 336-37. *See also* Anderson v. Nosser, 438 F.2d 183, 190 (5th Cir. 1971), *cert. denied,* 409 U.S. 848 (1972); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 685 (D. Mass. 1973), *aff'd,* 494 F.2d 1196 (1st Cir.), *cert. denied,* 419 U.S. 977 (1974); Collins v. Schoonfield, 344 F. Supp. 257, 265 (D. Md. 1972); Brenneman v. Madigan,

tion merely serves as an alternative when bail is impossible.[29] As such, detention should be in the "least restrictive means"[30] necessary to assure the detainee's presence at trial without endangering the security of the jail.[31] Just as bail may be found excessive,[32] so too may the conditions of detention.[33]

Detention, unlike imprisonment, is not punitive.[34] The presump-

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343 F. Supp. 128, 135-36 (N.D. Cal. 1972); Hamilton v. Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971).

29. 507 F.2d at 336-37. Detention is also required for an accused who does not meet the standards for release on his own recognizance. *See* Brenneman v. Madigan, 343 F. Supp. 128, 135 (N.D. Cal. 1972).

30. Hamilton v. Love, 328 F. Supp. 1182, 1192 (E.D. Ark. 1971) (interim order), *final order entered*, 358 F. Supp. 338, *motion order entered*, 361 F. Supp. 1235 (E.D. Ark. 1973).

31. 507 F.2d at 336-37. *See also* Jones v. Wittenberg, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972), where it was stated that "[detainees] are not to be subjected to any hardship except those absolutely requisite for the purpose of confinement only, and they retain all the rights of an ordinary citizen except the right to go and come as they please . . . ." 323 F. Supp. at 100. In Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972), the court held that "[p]re-trial detainees do not stand on the same footing as convicted inmates . . . . [S]ubjecting pre-trial detainees to restrictions and privations other than those which inhere in their confinement itself or which are justified by compelling necessities of jail administration, is a violation of the due process and equal protection clauses of the Fourteenth Amendment." *Id.* at 142. *See also* Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 685-86 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974); Collins v. Schoonfield, 344 F. Supp. 257, 265 (D. Md. 1972).

32. *See, e.g.*, Carlson v. Landon, 342 U.S. 524 (1952); Stack v. Boyle, 342 U.S. 1 (1951).

33. 507 F.2d at 336-39. While courts do not choose to directly analogize from excessive bail to excessive detention, the implication is certainly there. *See* text accompanying notes 54-55 *infra*. In fact, the test of excessiveness of bail is similar to that of unconstitutionality of detention; that is, whether bail is set at a higher figure than is reasonably calculated to insure that the accused will stand trial. White v. United States, 330 F.2d 811 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964); *see* Forest v. United States, 203 F.2d 83 (8th Cir. 1953).

34. 507 F.2d at 338. *See also* Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *cert. denied*, 409 U.S. 848 (1972), where it was held that

tion of innocence until proven guilty[35] and the most basic notions of due process[36] dictate that a detainee, untried and unconvicted, should not be punished.[37] Although not intentionally punitive, the court reasoned that conditions of detention may constitute de facto punishment[38] and deny due process.[39]

The Second Circuit in *Rhem* based its finding of unconstitutionality on denial of both due process[40] and equal protection.[41] The district court found that conditions at the Tombs were in excess of those required to assure the detainees' presence at trial[42] and could

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"[i]ncarceration after conviction is imposed to punish, to deter, and to rehabilitate the convict. . . . Conversely, where incarceration is imposed prior to conviction, deterrence, punishment, and retribution are not legitimate functions of the incarcerating officials. Their role is but a temporary holding operation, and their necessary freedom of action is concomitantly diminished. . . . Punitive measures in such a context are out of harmony with the presumption of innocence." *Id.* at 190 (citation omitted). In Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) (interim order), *final order entered*, 358 F. Supp. 338, *motion order entered*, 361 F. Supp. 1235 (E.D. Ark. 1973), the court reasoned: "It is clear that the conditions for pre-trial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for the crimes they have committed against society." *Id.* at 1191. In fact, detainees should not even be referred to as "prisoners," concerning the usual connotation of the term. *Id.*

35. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951).

36. "Due process is a pervasive concept which embodies, even in its most rudimentary form, the notion of fundamental fairness whenever governmental action may result . . . in grievous loss to the individual." Brenneman v. Madigan, 343 F. Supp. 128, 137 (N.D. Cal. 1972). *See also* Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961).

37. 507 F.2d at 336-38.

38. *Id.* at 338. *See also* Brenneman v. Madigan, 343 F. Supp. 128, 137-38 (N.D. Cal. 1972); Hamilton v. Love, 328 F. Supp. 1182, 1193 (E.D. Ark. 1971) (interim order), *final order entered*, 358 F. Supp. 338, *motion order entered*, 361 F. Supp. 1235 (E.D. Ark. 1973); Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

39. 507 F.2d at 338.

40. *See* text accompanying notes 42-45 *infra*.

41. *See* text accompanying notes 46-47 *infra*.

42. The city alleged that any deprivation which an inmate must face

not be justified by security needs.[43] It therefore concluded that the conditions of confinement constituted cruel and unusual punishment, which violated due process.[44] This determination was found free of error on appeal.[45]

The district court also determined that conditions in New York State penal institutions for convicted criminals and conditions in other federal and municipal detention centers for detainees were far superior to conditions in the Tombs.[46] As a result, the circuit court found a violation of equal protection.[47]

Arguably the equal protection clause would be relevant to any case where the conditions of confinement of a detainee are significantly and unnecessarily inferior to those of an accused free on bail. Thus, conditions sufficiently objectionable to violate due process

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is a function of the length of time he is confined there. Statistics for 1973 indicated that 50% of newly admitted detainees stayed less that 14 days, 71.2% stayed less than 45 days, and 87.5% remained less than 120 days. Brief for Appellant at 17, Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974).

43. 371 F. Supp. at 624.

44. *Id.* at 636. Given the Supreme Court's declaration in Malinski v. New York, 324 U.S. 401 (1945), that due process is violated by that which "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Id.* at 417 (Frankfurter, J., concurring). The district court's declaration that conditions at the Tombs "would shock the conscience of any citizen who knew of them," 371 F. Supp. at 636, seems to be in accord with this standard. *See also* Rochin v. California, 342 U.S. 165 (1952).

45. 507 F.2d at 339. The city did not argue that the district court's findings of fact were "clearly erroneous." Yet, noted the circuit court, the record was so strongly supportive of the district judge that the city could not have done so with any success. *Id.* at 336.

46. 371 F. Supp. at 622.

47. 507 F.2d at 338. The argument was not made that conditions at other detention centers within the City of New York were superior to those at the Tombs. This showing could also serve as the basis for an equal protection finding. The court seems to imply that an equal protection argument would be valid only where at least one institution is superior to the one under judicial scrutiny. Under this reasoning, given a situation where all institutions are of similarly poor condition, equal protection would not be helpful, since all prisoners are being afforded equal, albeit terrible, treatment.

would also violate equal protection.

Plaintiffs had alleged that their eighth amendment rights[48] had also been violated.[49] In a previous case,[50] the Second Circuit had expressed "considerable doubt that the . . . [eighth amendment] is properly applicable at all until after conviction and sentence."[51] In *Rhem,* it agreed with the district court[52] that although the eighth amendment was inapplicable, "a detainee is entitled to protection from cruel and unusual punishment as a matter of due process and, where relevant, equal protection."[53]

The eighth amendment does not specifically prohibit excessive detention.[54] But it may do so by implication. Since the amendment prohibits excessive bail, and since detention is nothing more than a substitute for bail, it can be argued that excessive detention is constitutionally prohibited as well. The eighth amendment might, therefore, be applicable to this and other cases involving pre-trial detainees, not through the cruel and unusual punishment clause,

48. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

49. Some courts have so held. *See, e.g.,* Anderson v. Nosser, 438 F.2d 183, 191-93 (5th Cir. 1971), *cert. denied,* 409 U.S. 848 (1972); Johnson v. Lark, 365 F. Supp. 289, 301-03 (E.D. Mo. 1973); Collins v. Schoonfield, 344 F. Supp. 257, 264-65 (D. Md. 1972), 363 F. Supp. 1152 (D. Md. 1973); Jones v. Wittenberg, 323 F. Supp. 93, 99-100 (equitable order), *damages awarded,* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

50. Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973).

51. *Id.* at 1032.

52. *See* 371 F. Supp. at 623-24.

53. 507 F.2d at 337. *See also* Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd,* 494 F.2d 1196 (1st Cir.), *cert. denied,* 419 U.S. 977 (1974), where it was held that "dealing with conditions of pretrial detention, this type of case is more appropriately analyzed under the due process clause of the Fourteenth Amendment than under the cruel and unusual punishment provisions of the Eighth Amendment." *Id.* at 688. *See also* Brenneman v. Madigan, 343 F. Supp. 128, 136-38 (N.D. Cal. 1972); Jones v. Wittenberg, 323 F. Supp. 93, 100 (equitable order), *damages awarded,* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

54. *See* U.S. CONST. amend. VIII.

but rather through its prohibition of excessive bail.[55]

Those conditions which remained uncorrected[56] and which ultimately led to the district court's decree enjoining the city from further housing of detainees in the Tombs included not only practices employed by the city in operating the facility,[57] but also structural deficiencies[58] in the building itself. Furthermore, the facility could not be improved without the allocation of large amounts of time and money, both of which the city claimed it did not have.[59]

The district court held that the city's poverty could not excuse its failure to remedy the constitutionally violative conditions.[60] It con-

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55. *See* note 33 *supra*.

56. These conditions included the institution of a classification plan to avoid excessive imposition of maximum security conditions, adequate provision for contact visits, increased recreation and exercise facilities, remedying of excessive heat, inadequate ventilation, intolerable noise levels (which the New York City Environmental Protection Agency found equal to that of the city subway system, 371 F. Supp. at 628), and the absence of transparent windows. *Id.* at 600.

57. *See* note 56 *supra*. Several cases in which courts have become involved in prison administration have arisen out of allegedly unconstitutional practices employed by prison staff and did not concern physical deficiencies in the prison structure itself. *See, e.g.*, Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *cert. denied*, 409 U.S. 848 (1972) (punitive measures taken against racial protest demonstrators); Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157 (E.D. Wis. 1973) (deprivation of privileges); Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972) (various practices); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971) (disciplinary procedures); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968) (racial segregation); SaMarion v. McGinnis, 253 F. Supp. 738 (W.D.N.Y. 1966) (interference with freedom of religion); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965) (corporal punishment).

58. *See* 371 F. Supp. at 600. To a certain extent, however, these conditions were found to be a result of the imposition of maximum security. *Id.*

59. Brief for Appellant at 38-39, Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974). The city estimated that it would require between $17-25 million to complete the necessary repairs, which was far in excess of what was available under the city's current budget. No time-table could, therefore, be provided as to when work would commence, let alone when it would be completed. 377 F. Supp. at 1003.

60. 377 F. Supp. at 999, *relying on* Goldberg v. Kelly, 397 U.S. 254 (1970), where it was held that the government's interest in avoiding an

cluded that the protection of constitutional rights must be given priority over other goals requiring legislative funding.[61] The district court had issued a decree which the city claimed it was powerless to obey,[62] and so the constitutional rights of those detained at the Tombs continued to be violated.[63] Only one alternative remained —close the Tombs.[64]

On appeal, the appropriateness of this remedy was brought into question.[65] The city alleged that thirty days was too short a period to develop the required "comprehensive and detailed plan."[66] The court of appeals found that although the district court's March 1974 order[67] may have been too strict, the Tombs was not ordered closed

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increase in its fiscal burdens was clearly outweighed by the interest of an Aid to Families with Dependent Children (AFDC) recipient in the uninterrupted receipt of public assistance benefits. *Id.* at 266. *See also* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), where Justice, then Judge, Blackmun stated: "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . . ." *Id.* at 580.

61. 377 F. Supp. at 999.

62. *Id.* The city did not contest the court's authority to require the submission of a plan for the alleviation of the unconstitutional conditions at the Tombs, but nevertheless refused to do so. *Id.* The city constantly stressed its willingness to comply with the court's order, yet maintained that it was powerless to do so. It further wanted its good faith efforts, which were found not to effect the finding of unconstitutionality, 507 F.2d at 338-39, to be taken into consideration. Interview with Mark D. Lefkowitz, Attorney for Corporation Counsel of the City of New York, in New York City, Oct. 15, 1974.

63. 377 F. Supp. at 999. The district court found that, "[w]hile some improvements have been made in the conditions which then existed, nevertheless . . . the bulk of those conditions remain as they were." *Id.* For example, the inmate population had been reduced from 1300 at the start of the trial to 522 by July 11, 1974, 507 F.2d at 339 n.10, yet this did not effect the unconstitutionality of the conditions at the Tombs.

64. 377 F. Supp. at 999. The court emphasized that the order was subject to reconsideration and that all the city had to do to avoid this result was to develop, within 30 days, the required plan. The court was willing to allow the city a reasonable time to make the necessary improvements. *Id.*

65. 507 F.2d at 339-40.

66. *Id.* at 339.

67. 377 F. Supp. at 997. The order allowed only 30 days for considera-

until July. Even then, the city was allowed another thirty days to make some good faith effort to comply with the original order.[68] Thus, "[i]f the handwriting was not yet clearly on the wall, it was at least more than barely legible to an interested reader."[69]

Because of the unusual circumstances, the substantial time and money required to effect the necessary repairs and changes, the location of the jail in the center of a large metropolitan area, and the alleged financial difficulties of the city,[70] the court of appeals felt that a more flexible remedy could be framed "to close the prison to detainees or to limit its use for detainees to certain narrow functions by a fixed date, unless specified standards are met."[71] The court noted that the ultimate effect of such a remedy might be much the same as that utilized by the district court,[72] but that it had the advantage of "not putting the judge in the difficult position of trying to enforce a direct order to the City to raise and allocate large sums of money . . . steps traditionally left to appropriate executive and legislative bodies responsible to the voters."[73]

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tion of the alternatives available to the city, which included renovation of the Tombs, use of the Rikers Island facilities, or the construction of a new jail. 507 F.2d at 339.

68. 507 F.2d at 339.

69. *Id.*

70. Brief for Appellant at 6, Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974). *See* note 53 *supra*.

71. 507 F.2d at 340. The appropriate standards or permissible limited uses were to be established by the district court on remand. *Id.* The court proposed possible alternatives. For instance, use of the Tombs might be limited to certain specified purposes, such as initial temporary confinement, or overnight housing of detainees scheduled to appear in court or meet with their attorneys the following day. Or the Tombs might be ordered closed unless conditions were upgraded to meet the criteria outlined in the district court's opinion or if the district court felt certain that the city could not, or would not, correct the constitutional deficiencies. *Id.* at 341. However, the district court already felt certain that the city would not, or could not, make the necessary changes. 377 F. Supp. at 999. This indicates the circuit court's reluctance to issue a sweeping order closing the Tombs. The court was, in effect, giving the city still another chance.

72. 507 F.2d at 340-41. In other words, the Tombs might eventually be closed in either case.

73. *Id.* at 341.

This continuing concern with maintaining judicial restraint in prison reform has most recently been emphasized in *Procunier v. Martinez*,[74] where the prisoner mail censorship regulations of the California Department of Corrections were held unconstitutional by the Supreme Court. Justice Powell, writing for the Court, stated:

> [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.[75]

Both *Rhem* and *Procunier* indicate a lingering judicial reluctance to become involved in prison reform, despite the waning of the "hands off" doctrine. Even after intervening, the circuit court in *Rhem* sought to avoid a broad and sweeping decree which might result in a confrontation between the judiciary and the executive branch.[76]

In proposing a more flexible remedy, the court pointed out that "[t]he choice of remedy . . . has tremendous implications not only for the City but also for pre-trial detainees who may find themselves dispersed to facilities far away from family, friends and attorneys."[77]

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74. 416 U.S. 396 (1974).

75. *Id.* at 404-05.

76. *See also* Jones v. Wittenberg, 330 F. Supp. 707, 712-13 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971) (interim order), *final order entered*, 358 F. Supp. 338, *motion order entered*, 361 F. Supp. 1235 (E.D. Ark. 1973). In *Rhem*, since closing the Tombs was a realistic alternative, the court was not faced with the awkward situation where the facility must be kept open at all cost, which would necessitate the court forcing the locality to appropriate the required money. 507 F.2d at 341 n.19.

77. 507 F.2d at 341; *see* note 14 *supra*. Many of the detainees agreed with the circuit court's decision. However, some who had been to several of the city's detention centers said they wanted to stay at the Tombs because it was adjacent to the Criminal Courts Building and more convenient for visitors. In fact, more than 200 inmates signed a petition protesting the closing. N.Y. Times, Dec. 21, 1974, at 1, col. 8. In this light, it is questionable whether plaintiff class has really benefited from over four years of litigation. 507 F.2d at 341. An attorney for the Legal Aid Society

Had the Rikers Island institution not been available, *Rhem* might stand as a stronger precedent than it does. Because of Rikers Island, the court was able to frame a decree with it in mind, and the city was able to effectively side-step the court's order by transferring the Tombs population there. Thus the court was never really faced with the problem of trying to enforce an order to close the Tombs. Had Rikers Island not been present, both the court's remedy and the city's response might have been significantly different. A true confrontation between city and judiciary might have arisen, and the resolution thereof would have shed more light on the true power of the federal court in prison reform.[78]

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indicated that it once took him over 2 ½ hours to reach Rikers Island from Manhattan. This temporal, though not spatial, distance places severe restrictions on attorney-client contact as well as on prisoner-family contact, and as such may render the Rikers Island facility unsatisfactory as an alternative to the Tombs. Interview with Stephen A. Herman, Attorney for the Legal Aid Society Prisoners' Rights Project, in New York City, Oct. 21, 1974. Only 14 out of 261 eligible inmates at the Tombs requested transfers to Rikers Island under the circuit court's order staying the injunction pending appeal. *See* note 12 *supra*. The city alleged this indicated improved conditions at the Tombs, Brief for Appellant at 37, Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974), but it is probably more a testament to the unacceptability of Rikers Island. It was indicated, however, that a federal order would be sought "to assure that conditions condemned at the Tombs were not repeated on Rikers Island." N.Y. Times, Dec. 3, 1974, at 43, col. 4.

78. A recent development in the case indicates that this confrontation may be imminent. After the Tombs was closed, plaintiffs, now at Rikers Island, alleged that they were entitled to all the rights held to be theirs by the circuit court, except those dealing solely with the physical conditions at the Tombs. The city argued that the district court was without power to grant relief to those now at Rikers Island. The district court disagreed, however, and ruled that no new suit or trial was required. It then ordered improvements in conditions for those prisoners transferred from the Tombs. In particular, the district court required that within a specified time the city must: 1) develop a classification system; 2) allow prisoners to leave their cells at all times except for periods to count them and clean up; 3) after the classification has been established, develop a more restrictive lock-in system for those requiring maximum security; 4) install in two cell blocks an experimental system whereby prisoners are allowed to stay in their cells during activity periods; 5) allow all prisoners contact visits, which may later be denied if it is determined that maximum security is

Both courts sought to be as lenient as possible with a city beset with countless problems.[79] In spite of this sympathy, however, the court of appeals upheld the district court's determination that municipal poverty could not justify constitutional deprivations[80] when it concluded:

> [P]re-trial detainees are people, not outcasts, who are presumed to be innocent of any crime and who have rights guaranteed by the Constitution, as do we all. When a district court is presented with a claim of violation of those rights, its proper function is to decide the case before it, whatever sympathy it may have for those who must manage a great metropolis beset by grievous problems. Nor can similar considerations deflect us from the issues on appeal.[81]

Rhem v. Malcolm thus serves as a warning to other municipalities with constitutionally deficient prisons: clean them up or close them down. It warns further that fiscal inability will not be accepted as a justification for denying constitutional rights, even from a city so large and with problems so compelling as New York. The circuit court failed, however, to define the rights of pre-trial detainees and the "least restrictive means"[82] of confinement.[83] The use of two

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required; 6) expand the visiting schedule to allow each detainee one night visit per week; and 7) hire more men to afford each inmate one hour of outdoor exercise each weekday. Rhem v. Malcolm, Civil No. 70-3962 (S.D.N.Y., filed Feb. 20, 1975). The ruling was severely criticized by Commissioner Malcolm, who charged the district court with " 'interference in the internal affairs of local government.' " The Commissioner stated that the city does not have the money to make the necessary repairs, and indicated that the decision would be appealed to the Supreme Court if necessary. N.Y. Times, Feb. 22, 1975, at 31, col. 8.

79. 507 F.2d at 341-42; 377 F. Supp. at 999.

80. 507 F.2d at 342. *See* text accompanying notes 60-61 *supra*.

81. 507 F.2d at 342. There is no constitutional right to adequate housing provided by the government. Lindsey v. Normet, 405 U.S. 56 (1972). However, a detainee has a constitutional right to housing in the "least restrictive means" necessary to assure his presence at trial. *See* note 30 *supra* and accompanying text. Thus, if fiscal pressures required, a city or state might have to suspend its public housing activities in order to assure that conditions of detention were acceptable.

82. *See* note 30 *supra* and accompanying text.

83. It had been hoped that the court would make such determinations. Interview with Steven A. Herman, Attorney for the Legal Aid Society Prisoners' Rights Project, in New York City, Oct. 21, 1974.

seemingly different standards, "least restrictive means"[84] and "shock the conscience,"[85] is confusing. If what exceeds the "least restrictive means" also "shocks the conscience," the circuit court should have so indicated; if the two tests are not the same, the differences should have been explained.[86] The circuit court's omission of specific standards may indicate that prison reform must proceed on a case-by-case basis.

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84. *See* note 30 *supra* and accompanying text.

85. *See* note 44 *supra*.

86. It would appear that the "shock the conscience" test sets a bare minimum for constitutional tolerability. The "least restrictive means," however, seems to be a higher standard, more ideal and less susceptible to definition. If this is so, one could conceive of detention which is not in the "least restrictive means" yet does not "shock the conscience."